IN THE HIGH COURT OF GUJARAT AT AHMEDABAD.

SPECIAL CIVIL APPLICATION No 4599 OF 1991

For Approval and Signature :

Hon'ble MR. JUSTICE S.K.KESHOTE

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1. Whether Reporters of Local Papers may be allowed to see the Order ?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the Order ?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

KANTILAL MOHANLAL KANADLA

VERSUS

STATE OF GUJARAT

Appearance:

MR KETAN DAVE for the Petitioner

MR SAMIR DAVE for the Respondent No.1

None present for other respondents

CORAM : MR JUSTICE S.K.KESHOTE

Date of Order : 17/02/2001

C A V JUDGMENT

#. The petitioner, by this petition under Article 226 of the Constitution of India challenging the validity of the termination of his services from the Clerical cadre in the establishment of the Amreli District Panchayat.

#. The facts of the case which lead to filing of this petition are that the petitioner was appointed as Assistant Instructor on being selected by the Gujarat Panchayat Services Selection Board on 25.2.1971 in the Industrial Training Institute run by District Panchayat. On the closure of the Industrial Training Institute the petitioner was rendered surplus and he was ordered to be absorbed as clerk by the District Panchayat, Surat on 28.2.1976. The order of the absorption of the petitioner on the post of Clerk is there on the record of the Special Civil Application. This absorption was subject to certain conditions and one of the conditions was that he has to face selection for this post before the Gujarat Panchayat Services Selection Board. Later on this condition was modified and he was only required to face the interview. There is no dispute that as per the service rules and service conditions of the post of the cadre, the petitioner has to pass pre-service training examination in the specified chances. In this case, the petitioner was once appeared in the examination for pre-service training examination but he failed. This happened in the year 1982. It is the case of the petitioner that he has not informed about the second opportunity whom he could have appeared. The petitioner states that he availed of the opportunity next following which was treated by the Panchayat as Third opportunity. The petitioner as per his case was informed of this opportunity vide order dated 4.4.1990 issued by the Dy. D.D.O. (Establishment), Amreli. It is to be stated here that after his absorption as clerk the petitioner has been transferred from District Panchayat, Amreli on his own request. The petitioner stated that in response to the aforesaid letter of the Dy.D.D.O. (Establishment), Amreli he reported for examination at the examination centre, Bhavnagar. He was not given the roll number and he was not allowed to appear in the examination. Reference in this respect may have to the letter dated 16.2.1991 of the Deputy Collector, Pre-service Training Centre, Bhavnagar. As the petitioner has availed of three chances of the examination the services of the petitioner were terminated under order dated 11.12.1990 of the Dy. D.D.O. (Establishment), Amreli. He was relieved from services on 12.12.1990. Against this order the petitioner filed appeal to the District Development

Officer, Amreli. The appeal was admitted by the District Development Officer on 13.12.90 and the interim relief has also been granted in favour of the petitioner directing the district Panchayat to reinstate the petitioner in service until further orders. Accordingly, the petitioner was taken back on duty on 13.12.1990. I find contradictory pleadings in para 5 of the Special Civil Application. In para 4 of the Special Civil Application the petitioner stated as a fact that his services have been brought to an end by order of Dy. D.D.O. (Establishment), Amreli on 11.10.1990 contrary to which in para 5 the petitioner has stated that he has since learnt that P.H.C., Damnagar has received a copy of the order purporting to terminate the petitioner's services. It is further stated that the same has not been served upon the petitioner as he was on C.L. since 10.7.1991.

#. The reply to the Special Civil Application has been filed by the respondents Nos. 2 and 3 to which the petitioner has filed rejoinder. In the reply to the Special Civil Application preliminary objection was raised re. maintainability of the Special Civil Application on the ground of availability of alternative remedy. The petitioner filed rejoinder as said earlier in which he stated that the appeal which is filed before District Development Officer is pending. He further admitted that he made a representation in this matter on 9.10.1986 to the Development Commissioner, Gandhinagar and that is also pending.

#. In reply to the Special Civil Application the respondents come up with the case that the case of the petitioner was referred to the Government and the respondent Panchayat has received communication from the Government vide letter dated 11.6.1991, inter alia, stating that the petitioner has not passed the examination within stipulated chances and therefore, his services are liable to be terminated and the Government has not accepted his request for exemption and therefore the question of deciding the appeal of the petitioner did not arise. It is stated that thereafter order dated 9.7.1991 terminating services of the petitioner has been made under the instruction of the District Development Officer.

#. The learned counsel for the petitioner raised manifold contentions on merits of the matter. Nobody is present on behalf of the respondent Nos. 2 and 3 to make any submission. The learned counsel for the respondent No.1 has made submission that the petitioner has already

availed of the remedy of appeal and this petition is not maintainable. He further contended that since the matter is pending before Development Commissioner this petition is not maintainable. Carrying this contention further he has contended that the petitioner has absorbed in the cadre of clerk and service conditions prescribed for that post are to be applicable in his case. It is submitted that in case in the order of absorption it is not mentioned that he has to pass pre-service examination it is hardly any substance and merits to the petitioner as the service condition is that he has to pass the pre-service examination.

#. As I am satisfied that in this case not only the petitioner has alternative remedy but in fact the petitioner availed that remedy and appeal is pending, this petition is not maintainable. I do not consider it to be appropriate to go on the merits of the matter considering all the contentions raised by the learned counsel for the petitioner and record findings on each and every contention.

#. The learned counsel for the petitioner contended that the appeal filed by the petitioner is now of no value as the State Government has passed order not granting any benefit to the petitioner and pursuance thereof the District Panchayat decided to terminate the services. The DDO before whom the appeal has been filed cannot reverse the decision of the State Government.

#. I do not find any merits in this contention of the learned counsel for the petitioner. It is true that in this matter the State Government has been approached by the District Panchayat for granting exemption to the petitioner for passing of the pre-service training examination and that prayer has not been accepted. But other the grounds are available to the petitioner to raise before the appellate authority and it is obligatory on the part of the appellate authority to consider and decide the same. One of the grounds raised by the petitioner that he was not required to pass pre-training examination. It is still open to the appellate authority to consider and decide the same. Similarly other point that it was not one of the condition provided under the order which this point is still open to the petitioner to agitate and open to the appellate authority to decide the same. So far as another point raised that under the relevant service rules for passing examination prescribed for the Panchayat employees the petitioner's services could have been terminated is open for raising for consideration. By draft amendment the petitioner brought

on the record subsequent developments which have been taken place all these points and it is also open for the petitioner to raise before the appellate authority and it is obligatory on the part of the appellate authority to consider the same. It is no more res integra that in case where the litigant has right of appeal against the impugned order and that remedy has been availed of by him, the petition under Article 226 of the Constitution of India is not maintainable. It is a case where not only efficacious alternative remedy was available to the petitioner but in fact it was availed of. I fail to see how he could have shifted to another remedy without first exhausting the remedy availed of. This is nothing but only reiterating of its earlier action of terminating services of petitioner by the District Panchayat. This action / order does not give any cause to the petitioner to approach this court. It is also a matter of termination of services of the petitioner and which is sub-judice at his instance in appeal filed before the District Development Officer, District Panchayat, Amreli. This matter is squarely covered by the decision of the Hon'ble Supreme Court in the case of Bombay Metropolitan Region Development Authority Vs. Gokak Patel Volkart Ltd. and Anrs. reported in JT 1995(1) SC 155. Therein their Lordships of Hon'ble Supreme Court held that where alternative efficacious remedy is available and the same is availed of, the petition at his instance is not maintainable. Only on this ground this petition deserves to be dismissed. It is a case where the remedy of the appeal is equally efficacious and effective as the appellate authority has granted interim relief in favour of the petitioner also. It is not the case of the petitioner that interim relief granted by the appellate authority has been vacated in later part of time.

#. In the result, this Special Civil Application fails and the same is dismissed. However, the appeal committee is directed to decide the appeal of the petitioner without influencing by the fact that the State Government has declined to grant the exemption to the petitioner on merits in accordance with law within a period of 2 months from the date of the receipt of the writ of this order. Compliance of this order be reported to this court. The rule is discharged accordingly. However, in the facts of this case no order as to costs.

(S.K.Keshote, J.)

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